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No. 83-5148

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOSE MARTINEZ HIGH,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

I.

Was the imposition of the death penalty on a person seventeen years of age at the time of the offense permissible under the Constitution?

II.

Did the state courts utilize the correct standard in determining that Petitioner's trial counsel rendered effective assistance?

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PART ONE
STATEMENT OF THE CASE

Petitioner, Jose Martinez High, was sentenced to two death sentences by the Superior Court of Taliaferro County on December 1, 1978. Petitioner was convicted of murder, two counts of kidnapping with bodily injury, armed robbery, possession of a firearm during the commission of a crime and aggravated assault. He was originally sentenced to death for the murder, armed robbery and both counts of kidnapping with bodily injury. On direct appeal, the Supreme Court of Georgia affirmed the convictions for armed robbery, murder and the two counts of kidnapping with bodily injury but vacated the convictions for possession of a firearm and aggravated assault, holding that these crimes merged into the crimes of armed robbery and kidnapping with bodily injury. The court affirmed the death penalty in two of the four counts, but vacated the death sentences for the armed robbery conviction and one count

of kidnapping with bodily injury where the victim did not die. High v. State, 247 Ga. 289, 276 S.E.2d 5 (1981). A subsequent petition for writ of certiorari was denied by this Court on January 25, 1982, and a petition for rehearing was denied on March 22, 1982. High v. Georgia, 455 U.S. 927 (1982).

Petitioner then filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. That court denied relief on June 25, 1982, and denied a motion for a stay of execution. On June 30, 1982, the Supreme Court of Georgia granted the motion for a stay of execution and the application for a certificate of probable cause to appeal. That Court remanded the case to the habeas corpus court for an evidentiary hearing on the petition.

A hearing was conducted in the Superior Court of Butts County, Georgia on August 12, 1982. That court determined that all the allegations were without merit and denied relief on September 10, 1982. The Supreme Court of Georgia subsequently granted an application for a certificate of probable cause to appeal and affirmed the denial of habeas corpus relief. High v. Zant, 250 Ga. 693, 300 S.E.2d 654 (1983). The instant petition for writ of certiorari was then filed with this Court.

PART TWO

STATEMENT OF FACTS

A detailed statement of facts was set out by the Supreme Court of Georgia on direct appeal from a companion case to the instant case in Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979). The statement of facts will not be repeated at this time but those facts necessary to address the issues raised will be set forth during the argument portion of this brief.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER'S RIGHTS WERE NOT VIOLATED BY HIS BEING SENTENCED TO DEATH, EVEN THOUGH HE WAS SEVENTEEN YEARS OLD AT THE TIME OF THE OFFENSE.

Petitioner has asserted that this Court should grant certiorari to review the question of whether the infliction of the death penalty "on a child under the age of eighteen at the time of the offense" constitutes cruel and unusual punishment. Respondent asserts that this issue is not such as to justify the granting of a petition for a writ of certiorari.

This issue was presented initially to this Court on the petition for writ of certiorari after direct appeal. This Court declined to grant the petition at that time. High v. Georgia, supra. The issue was again raised in the state habeas corpus petition. The Supreme Court of Georgia concluded that the imposition of the death penalty was not cruel and unusual punishment per se merely because Petitioner was a minor at the time of the offense. High v. Zant, supra, 250 Ga. at 701.

It is initially important to note that contrary to the allegations of Petitioner, he was not a child under Georgia law at the time of the murder of the victim. Under the Georgia law providing for juvenile proceedings, a child is defined as an individual who is under the age of seventeen. O.C.G.A. § 15-11-2(2); Ga. Code Ann. § 24A-401(C). As Petitioner states that he was seventeen years old at the time of the offense, he was an adult under Georgia law.

This Court has granted certiorari in the past to consider the question of whether a sixteen year old juvenile could be sentenced to the death penalty under the Eighth Amendment; however, in reaching the decision in that case, this Court did not decide this particular issue. Eddings v. Oklahoma, 455 U.S. 104 (1982). This Court focused on the exclusion of this

particular fact as mitigating evidence, rather than whether a sixteen year old could be sentenced to the death penalty.

In a dissenting opinion, Chief Justice Burger noted, "The Court stops far short of suggesting that there is any constitutional proscription against imposition of the death penalty on a person who was under age 18 when the murder was committed." Id. at 128. The Chief Justice went on to note that he would vote to affirm the judgment based on the sole issue on which the Court granted certiorari.

In that case, the Oklahoma Court of Criminal Appeals had concluded that the death penalty was not barred in the case. Eddings v. State, 616 P.2d 1159 (Okl. Cr. 1980). The defendant had argued that it was unusual to impose the death penalty on a juvenile, noting that Eddings was sixteen at the time of the offense. The Oklahoma court noted that when one was certified to stand trial as an adult, he was also certified to be punished as one. Under those circumstances, the court noted that the punishment was not unusual and was not cruel. The court went on to note that excessiveness was only to be determined in the context of the particular crime. Id. at 1167.

In the instant case, this Court is faced with a somewhat different situation because the Petitioner was not a juvenile under Georgia law at the time of the offense. Therefore, Respondent submits that no constitutional violation was presented based on the death sentence in the instant case merely because the Petitioner happened to be seventeen at the time of the offense. Thus, this issue presents nothing for review by this Court.

II. THE STATE COURT APPLIED THE PROPER STANDARD IN CONCLUDING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner has asserted that this Court should grant the petition to determine what standard should be applied in reviewing effectiveness of counsel in death penalty cases, citing this Court's granting of certiorari in Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1982) (en banc), cert. granted, 33 Cr. L. Rptr. 4073 (June 16, 1983). Respondent submits that as the appropriate standard was applied in the instant case, it is not necessary to grant the petition on this basis.

Petitioner asserts that the standard applied by the Supreme Court of Georgia and that utilized by the Fifth Circuit Court of Appeals appears to be in conflict with the standards set forth by the Eleventh Circuit in Washington v. Strickland, supra. Respondent asserts that rather than being in conflict, the standards are virtually identical. All three courts determined effectiveness of counsel based on the reasonably effective assistance standard. The Eleventh Circuit in Washington v. Strickland, supra merely went one step further and required that before relief could be granted based upon a finding of ineffective assistance, a petitioner demonstrate prejudice. This particular finding was not required in the instant case.

On considering the issue of effectiveness of trial counsel, the Supreme Court of Georgia noted that the main contention was that Petitioner was denied effective assistance of counsel because no witnesses were called during the sentencing phase. The court found as follows:

His counsel, a member of the Bar for many years and a lawyer possessing wide experience in the defense of criminal cases, including capital cases, testified before the habeas corpus court that he and two assistants made an effort to locate witnesses, and inquired of High as to the availability of witnesses - without avail, either from their own investigation or from suggestions put forward by High. He further stated that he had determined not to call High's parents for fear that their distress might be perceived by the jury to be feigned.

In support of his contention, High presented to the habeas corpus court a series of affidavits from family, friends, neighbors, and former teachers . . . .

Having presented these affidavits, High contends that his counsel, in failing to produce at the trial equivalent testimony, was of necessity ineffective, notwithstanding counsel's relation of the matter.

Lest the total circumstances within the courtroom be overlooked at this remove, we quote from High, supra, at p. 297; "The appellant showed no remorse for the killing, but rather bragged that 'he wanted to be the most famous black ringleader in the world.' Under the evidence of this case, there is no doubt that the kidnapping and murder were of the type universally

condemned by civilized societies as outrageously or wantonly vile or inhuman."

***

In viewing the contention of ineffective assistance of counsel, we cannot consider potential mitigation evidence in vacuo any more than the trial jury might blot out what they have seen and heard for several days in the guilt phase, once they turn to consider sentence. Here, the jury learned of the execution-style killing of an eleven -year-old child whose only offense against High was that he was present when High and his companions robbed a service station, thereby committing the crime of becoming an involuntary witness. Here, the jury was exposed to the tragic death of a little boy, shot through the head after High had continued to ask and assure him "'Are you ready to die? Do you want to die? Well you're going to die.'" High, supra, at p. 296. Here, the jury learned of a small child removed from a car, marched around the front of an automobile and forced to lie upon his face as three murderers snuffed out his life. Here, the jury heard of High bragging that "he wanted to be the most famous black ringleader in the world."

Up against that, High's counsel is charged with derogation of duty in failing to call someone who would mount the stand to say that Jose was a normal teenager, or that he never talked to a school pshchologist.

> In the face of the monstrosity of what High did to eleven-year-old Bonnie Bulloch, we can easily understand the decision of an experienced defense lawyer who sees, with us, the hazard of deigning to present such tranparencies.

High v. Zant, supra, 250 Ga. at 694-695 (emphasis in original). Thus, the Supreme Court of Georgia and the state habeas corpus court concluded that counsel was reasonably effective under the totality of the circumstances.

Respondent submits that this Court need not grant certiorari in the instant case to consider the standard to be applied as counsel in the instant case was reasonably effective under any standard applied to the facts of this case. Mr. John Ruffin, trial counsel, had been practicing law for twenty-one years and devoted at least twenty-five percent of his practice to criminal law. Prior to representing the Petitioner, he had represented approximately six defendants on occasions where the death penalty was sought and he stated that he spent more than fifty hours preparing for Petitioner's trial. The mere fact that Petitioner produced affidavits at the state habeas corpus hearing from various persons alleging they would have testified at the sentencing phase of the trial, does not show that these persons came forward and offered to appear as witnesses, that Petitioner provided his attorney with the names of these persons prior to or during trial, or that Mr. Ruffin should have discovered the names of these witnesses. The transcript of the state habeas corpus hearing reveals that the contrary is true. Mr. Ruffin testified that he had two law assistants working with him and investigating the case and that they all tried to secure witnesses to testify, but were unable to find any witnesses at that time. Mr. Ruffin asked the Petitioner if he knew of anyone whose testimony would have been helpful. Mr. Ruffin did not recall that Petitioner gave him any names of persons who would testify in his behalf.

The transcript of the state habeas corpus hearing also reveals that Mr. Ruffin spoke with both the Petitioner's mother and father, but that neither was helpful in supplying the names of any witnesses. Indeed, Mr. Ruffin testified that the parents were distraught and neither knew anything that would assist in Petitioner's defense. Regarding Petitioner's parents, Mr. Ruffin testified that it was part of his trial strategy not to call Petitioner's parents because he feared that the jury might believe that the concern of the parents was feigned. He also testified that even if he had called the witnesses who supplied affidavits for the state habeas corpus hearing, he did not believe it would have made any difference in the outcome of the Petitioner's trial.

Respondent submits that the record clearly reflects that counsel did investigate the case throughly and did not ignore the possibility of presenting mitigating evidence, but made tactical decisions in this regard, or simply did not have the evidence available. Thus, counsel was clearly effective under the totality of the circumstances. Therefore, as counsel easily meets the standard for effective assistance of counsel in this state, in the Fifth Circuit Court of Appeals and in the Eleventh Circuit Court of Appeals, there is no need for this Court to grant certiorari as no federal constitutional question is presented for review.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully reqests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Jose Martinez High.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States I have this date served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States mail with proper address and adequate postage to:

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This 30th day of August, 1983.

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